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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,958	09/22/2003	Henry Drummond Boswell	CM2632MC	1197

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EXAMINER

ELHILO, EISA B

ART UNIT PAPER NUMBER

1751

DATE MAILED: 07/13/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No. .

10/667,958

Applicant(s)

BOSWELL ET AL.

Examiner

Eisa B. Elhilo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 June 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3 and 5-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 5-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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DETAILED ACTION

1 A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 6/14/2005 has been entered.

NEW GROUND OF REJECTION

Claim Rejections - 35 USC § 102

2 The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim Rejections - 35 USC § 103

3 The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 6-10 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by or, in alternative, under 103(a) obvious over Dias et al. (US 6,004,355).

Dias et al. (US' 355) teaches a hair coloring composition comprising an oxidizing agent (see col. 3, line 3) and sequestrant (chelant) agents claimed in claim 1 (see col. 23, line 65), wherein the composition has a pH of 10, which within the claimed range as claimed (see col. 32,

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line 65), wherein the composition is an aqueous solution as claimed in claim 6 (see col. 32, Examples I to VI), wherein the oxidizing agent comprises an aqueous hydrogen peroxide which is present in the amount of 0.1% to about 4%, which is within the claimed range as claimed in claims 7-8 (see col. 5, lines 45-64), wherein the chelant is present at a level of from about 0.01% to about 10% by weight of the composition as claimed in claim 9 (see col. 24, lines 7-9), wherein the composition further comprises an oxidative hair dye precursor as claimed in claim 10 (see col. 10, line 50). Dias et al. (US' 355), also teaches a kit comprising an oxidizing agent and one or more coloring agents as claimed in claim 13 (see col. 22, lines 65-67). Dias et al. (US' 355) teaches the same hair treating ingredients of oxidizing agents and a chelant compound of Glycinamide-N,N'-disuccinic acid (GADS) (monoamine monoamide -N,N'-dipolyacid) in the claimed amount, which inherently would have the same physical properties of log ratio as claimed in claim 1, hydrogen peroxide decomposition ratio as claimed in claim 2 and ability to form a hexadendate complex with Cu^+ as claimed in claim 3. Dias et al. (US' 355) teaches all the limitations of the instant claims. Hence, Dias et al, anticipates the claims.

However, the claims in the alternative, under 35 U.S.C. 103(a) are obvious over Dias et al. (US' 355), because the reference teaches a hair dyeing composition comprising dyeing ingredients of an oxidizing agent of hydrogen peroxide in the claimed amount (see col. 5, lines 45-63) and a chelant compound of Glycinamide-N,N'-disuccinic acid (GADS) (monoamine monoamide -N,N'-dipolyacid) in the claimed amount (see col. 24, lines 7-9 and line 50), because these are similar dyeing ingredients. Further, a chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. (see *In re Spada*, 911 F. 2d 705, 709,

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15 USPQ2d 1655, 1658 (Fed. Cir. 1990), and, thus, a person of an ordinary skill in the art would expect such a dyeing composition to have ingredients having similar physical properties as those claimed including damage log ratio, hydrogen peroxide decomposition ratio values and ability to form a hexadendate complex with Cu^+ as claimed. Absent unexpected results.

Claim Rejections - 35 USC § 103

4 The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dias et al. (US 6,004,355) in view of Wenke (US 5,100,436).

The disclosure of Dias et al. (US' 355), as described above, teaches hair treatment compositions in the form of hair coloring compositions (see col. 31, lines 62-64), wherein the compositions are thickened aqueous compositions (comprising thickeners and water) (see col. 32, Examples I to VI). The reference does not teach a hair treating composition in the form of an oil-in-water emulsion as claimed.

Wenke (US' 436) teaches in analogous art of oxidative hair formulation, a composition comprising primary intermediates (oxidative dye precursors) (see col. 9, lines 15-24), oxidizing agents such as hydrogen peroxide (see col. 10, line 58) and chelating agents (see col. 9, lines 36-37), wherein the composition is preferably liquid solution but may be in the form of emulsion, suspensions, lotions or gel. (see col. 9, lines 37-39).

Therefore, in view of the teaching of the secondary reference, one having ordinary skill in the art at the time the invention was made would be motivated to formulate the composition of the primary reference in a form of an emulsion (oil in water) as taught by Wenke (US' 436). Such modification would be obvious because the primary reference teaches an aqueous hair treating composition (see col. 32, Examples I to VI). The secondary reference of Wenke. (US' 436) clearly teaches different forms of the hair dyeing composition such as liquid solution, emulsion, suspensions, lotions or gel. (see col. 9, lines 37-39), and, thus, a person of an ordinary skill in the art would be motivated to formulate the dyeing composition of Dias et al. (US' 355) in any form including the claimed emulsion form, and, would expect such a composition to have similar properties to those claimed, absent unexpected results.

5 Claims 11, 12 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dias et al. (US 6,004,355).

Dias et al. (US' 355) teaches methods for coloring hair similar to the claimed methods, in that the reference's methods comprise the steps of applying to the hair an oxidative hair coloring composition that comprises hydrogen peroxide component (oxidizing agent), oxidation dye precursors and chelating agents as described above, wherein the methods comprise the step of applying to the hair the hydrogen peroxide component prior to application of the admixed contents of the oxidative hair coloring agents and additional materials (see col. 34, lines 21-25), and wherein the methods also comprise the steps of mixing the oxidative hair coloring agents and oxidizing agent before application to the hair and the mixture is applied to the hair for periods of time depending upon the degree of coloring required (see col. 34, lines 6-7 and lines

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30-34). Dias et al. (US' 355) further, teaches that the composition can be applied separately (see col. 34, line 8).

Although, Dias et al. (US' 355) teaches a method for treating hair comprising the steps of applying to the hair a composition that comprise oxidation dyeing precursors, oxidizing agents and chelant components as described above, the reference does not teach the steps of the claimed methods with sufficient specificity to constitute an anticipation of the claims.

However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to use these methods for treating hair with a composition that comprises similar ingredients because the reference clearly teaches methods with different steps of applying the dyeing composition to the hair wherein the contents of the composition can be applied as a whole or separately as described above, and, thus, a person of an ordinary skill in the art would be motivated to utilize different methods for treating hair including the claimed methods and no matter which part of the composition is applied first, and would expect that these methods to have similar results to those claimed, in the absence of contrary.

Further, the applicants have not shown on record the criticality of the steps in the claimed methods.

Response to Applicant's Arguments

6 Applicant's arguments filed 6/14/2005 have been fully considered but they are not persuasive.

With respect to the rejection of the claims under 102(b)/ 103(a) as being anticipated by or in alternative obvious over Dias et al. (US 6,004,355), Applicant argues that Dias et al. fails to

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teach a composition which is substantially free of organic peroxyacid precursors and preformed organic acids as required in the instant amended claims.

The examiner respectfully disagrees with the above argument because Dias et al. (US' 355) does teach and disclose a dyeing composition free of organic peroxyacid precursors and preformed organic acids as claimed (see col. 32, Example A). Therefore, the composition inherently would have the same physical properties as claimed.

With respect to the rejection of the claims under 102(a), Applicant argues that Dias et al. alone or in combination with Wenke (US' 436) fails to teach a composition which is substantially free of organic peroxyacid precursors and preformed organic acids as required in the instant amended claims.

The examiner respectfully disagrees with the above argument for the same reasons mentioned above.

With respect to the declaration provided by the applicant to show unexpected results of the claimed invention over the prior art of record, the examiner's position is that the declaration is not commensurate in the scope with the claims because the "objective evidence of nonobviousness must be commensurate in the scope with the claims which the evidence is offered to support," In other words, the showing of unexpected results must be reviewed to see if the results occur over the entire claimed range. *In re Clemens*, 622 F.2d 1029, 1036, 206 USPQ 289, 296 (CCPA 1980). See also *In re Gransselli*, 713 F.2d 731, 741, 218 USPQ 769, 777 (F3d. Cir. 1983) (Claims were directed to certain catalysts containing an alkali metal. Evidence presented to rebut an obviousness rejection compared catalysts containing sodium with the prior

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art. The court held this evidence insufficient to rebut the prima facie case because experiments limited to sodium were not commensurate in the scope with the claims.). In this case the Comparative data in the declaration recite 2.0% of EDTA in composition 4, and 1.9% EDDS in composition 5, while the claimed recite an effective amounts and do not specifically claimed any amounts. Further, the species and the amounts of the chelant agents are not the same in the comparative data (see composition 1, 2 and 3) which are definitely have different damage as shown in the declaration. Therefore, the declaration is not commensurate in the scope with the claims or with the composition of the prior art of record.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eisa B. Elhilo whose telephone number is (571) 272-1315. The examiner can normally be reached on M - F (8:00 -5:30) with alternate Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta can be reached on (571) 272-1316. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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A handwritten signature in black ink, appearing to read 'Eisa Elhilo'.

Eisa Elhilo
Patent Examiner
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July 11, 2005